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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. .....

STATE FARM MUTUAL AUTOMOBILE INSURANCE Co. and RUTH NEWMAN,

Petitioners,

—against—

AAACON AUTO TRANSPORT, INC.,

Respondent.

PETITION FOR CERTIORARI TO REVIEW A FINAL DECREE OF THE NEW YORK STATE COURT OF APPEALS

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AACON AUTO TRANSPORT, INC.,

Respondent.

PETITION FOR CERTIORARI TO REVIEW A FINAL DECREE OF THE NEW YORK STATE COURT OF APPEALS

Petitioners request review, on writ of certiorari, of the final decree of the New York State Court of Appeals in this matter.

Opinions Below

The opinion and order of the New York State Court of Appeals, the highest court of the state, is officially reported at 41 N.Y.2d 951 and unofficially reported at 394 N.Y.S.2d 635 and 363 N.E.2d 359. The official report is appended to this petition at 1a.

The opinion of the intermediate New York appellate court, the Appellate Division of the Supreme Court, First Department, is officially reported at 52 A.D.2d 529 and is unofficially reported at 382 N.Y.S.2d 285. The official report is appended to this petition at 3a. The order of the

Appellate Division is appended to this petition at 4a-5a. (The Appellate Division's opinion merely states that it rests on "the reasons stated in" *Aaacon Auto Transport, Inc.* v. *Rosenbaum*. *Aaacon* v. *Rosenbaum* is officially reported at 50 A.D.2d 180 and is unofficially reported at 376 N.Y.S.2d 548. The official report is appended to this petition at 6a-11a.)

The opinion of the court of first instance, the Supreme Court, New York County, is officially reported at 77 Misc.2d 1069 and is unofficially reported at 356 N.Y.S.2d 171. The official report is appended to this petition at 12a-17a. The order of the Supreme Court, New York County, is appended to this petition at 18a-20a.

Jurisdiction

The decree sought to be reviewed was dated and entered on March 29, 1977.

On June 20, 1977, Justice Thurgood Marshall granted an order (No. A-1070) extending the time for filing this petition to and including July 26, 1977.

28 U.S.C. §1257 (3) authorizes review by writ of certiorari.

Question Presented

Did the New York Court of Appeals violate the Supremacy Clause of the United States Constitution by specifically enforcing, in reliance on a New York rule of estoppel, CPLR 7503(c), having no counterpart in federal law, provisions in respondent Aaacon Auto Transport's standard-form bill of lading that had been expressly condemned and rejected by the Interstate Commerce Commission and expressly held by the United States Court of

Appeals for the Second Circuit to be "unlawful" and "void" under §§20(11) and 217(a) of the Interstate Commerce Act, 49 U.S.C. §§20(11) and 317(a), and against public policy?[1]

Constitutional Provision Involved

The Supremacy Clause (Article VI, Clause 2) of the United States Constitution may be found at vol. 1 U.S.C. p. XLVII (1970 ed.) and provides as follows:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Federal Statute Involved

I. §20(11) of the Interstate Commerce Act.

§20(11) of the Interstate Commerce Act, Title 49 U.S.C. §20(11), may be found at vol. 10 U.S.C. p. 11903 (1970 ed.) and is appended to this petition at 21a-24a. Pertinent text is as follows:

> [A]ny such limitation ["of liability or limitation of the amount of recovery . . . in any bill of lading, or in any . . . tariff filed with the Interstate Commerce Commission"], without respect to the manner or form

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[1] *Aaacon Auto Transport, Inc.* v. *State Farm Mutual Automobile Insurance Co., subrogee of Joseph Romagnoli*, 537 F.2d 648 (2d Cir. 1976), *cert. denied*, —— U.S. ——, 97 S.Ct. 742, 50 L.Ed.2d 754, 45 U.S.L.W. 3463 (1977) (hereinafter cited as *Aaacon* v. *Romagnoli*) (reaching the stated holdings and discussing the treatment of these contract provisions by the Commission).

in which it is sought to be made is declared to be unlawful and void. . . .[2]

II. §217(a) of the Interstate Commerce Act.

§217(a) of the Interstate Commerce Act, Title 49 U.S.C. §317(a), may be found at vol. 10 U.S.C. p. 11958 (1970 ed.) and is appended to this petition at 25a. Pertinent text is as follows:

> [T]he Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.[3]

State Statute Involved

§7503(c) of the New York Civil Practice Law and Rules (CPLR) may be found in 7B of McKinney's Consolidated Laws of New York CPLR 6001-7700, p. 225 (1976 pocket part) and is appended to this petition at 26a. Pertinent text is as follows:

> A party may serve upon another party a demand for arbitration or a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice, or of an officer or agent thereof if such party is an association or corporation, and stating that unless the party served applies to stay

[2] A somewhat greater elaboration of the text, and a discussion of its relevance with respect to the contract provisions here at issue, may be found in *Aaacon* v. *Romagnoli, supra* note 1, at 537 F.2d 652, note 7, and 653-5.

[3] The text is reproduced in full in *Aaacon* v. *Romagnoli, supra* note 1, at 537 F.2d 652, note 8, and a discussion of the text's relevance with respect to the contract provisions here at issue may be found, *id.*, at 656-8.

> the arbitration within twenty days after such service he shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time. Such notice or demand shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. An application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or he shall be so precluded.

Statement of the Case

I. Nature of the Underlying Claim

Respondent Aaacon Auto Transport, Inc. (hereinafter referred to as "Aaacon" or "the carrier") is in the business of transporting individual, privately owned automobiles throughout the United States. The carrier deals with consumers all over the country and prominently proclaims to prospective customers that it "is the largest auto carrier licensed by the Interstate Commerce Commission providing complete delivery service for your automobile to or from every point in the United States" * * * "with offices in every major city from coast to coast." (Form letter mailed by Aaacon to petitioner Ruth Newman, dated Feb. 7, 1972, upon her inquiry to Aaacon prior to retaining its services. R. 56.[4])

In February 1972, petitioner Ruth Newman, an ordinary consumer, then a resident of Chicago, Illinois, made arrangements with Aaacon's Chicago office for the carrier to transport her automobile from Chicago to Los Angeles, California, where she was moving and where Aaacon also has an office (R. 48-51).

[4] Numbers preceded by the abbreviation "R." refer to pages in the Record filed in the New York State Court of Appeals.

While her vehicle was in Aaacon's possession, in transit through Illinois, it was allegedly damaged (R. 53). Mrs. Newman carried collision insurance with petitioner State Farm Mutual Automobile Insurance Company. Upon payment of her claim to her, less her deductible, State Farm became subrogated to the major portion of her claim against Aaacon (R. 61-2). (The petitioners collectively are hereinafter referred to as "the shipper".)

II. History of the Litigation

In or about July of 1973, the shipper sued the carrier in a county court in Chicago, Illinois, to recover for the alleged damage to the automobile (R. 47). Petitioner State Farm had the major interest in the Illinois action.

On or about July 13, 1973, Aaacon responded by mailing to Mrs. Newman's Illinois and California addresses, and to State Farm in Bloomington, Illinois, a letter entitled "Notice of Intention to Arbitrate" (R. 35). The notice stated, in pertinent part, that "pursuant to CPLR 7503 . . . , Aaacon hereby notifies you that it intends to arbitrate", and that, "Unless you apply to stay the arbitration within twenty days after service, you and each of you shall thereafter be precluded from objecting that a valid agreement was not made. . . ."

Five weeks later, on August 20, 1973, despite the fact that Aaacon has an office in Chicago, which had dealt with Mrs. Newman, and despite the fact that the vehicle had allegedly been damaged in Illinois while in the carrier's possession, and despite the fact that the shipper had already instituted an action against Aaacon in Chicago involving the claim, the carrier petitioned the New York State Supreme Court, New York County, in New York City, to stay the Chicago action and compel arbitration of the claim (R. 18-40).

The proceeding instituted by Aaacon in New York was based on certain provisions in its standard-form bill of lading (R. 28), signed by Mrs. Newman when her car had been picked up by Aaacon's representative (R. 50-51). In part pertinent here, these provisions state that the shipper consents to the personal jurisdiction of the New York state and federal courts and to service of process by certified mail at his last known address. Further, "Any claim or controversy whether founded in contract or tort, arising out of or relating to this agreement or performance or breach thereof, is non-assignable and shall be settled by arbitration in New York City." It is the quoted provisions that are here at issue and that the New York Court of Appeals enforced.[5]

The shipper appeared in the New York City proceeding instituted by Aaacon, challeged the enforceability of the arbitration clause with its venue limitation, and moved to dismiss on grounds of *forum non conveniens,* suggesting that under all the circumstances, the Illinois forum where an action was already pending between the parties would be a more appropriate forum then New York for testing the validity of the clause (R. 47-64).

In April 1974, the Supreme Court, New York County, dismissed the proceedings on grounds of *forum non conveniens,* holding that all questions relating to the enforceability of the arbitration clause could be more appropriately resolved in the Illinois forum. (12a-17a.)

The carrier appealed to the Appellate Division, First Department, of the New York Supreme Court.

In April 1976, the Appellate Division reversed and directed enforcement of the arbitration clause. (3a.) The

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[5] A complete quotation of the arbitration clause appears in the opinion of the Supreme Court, New York County, at 77 Misc. 2d 1070 (see appendix to this petition at 13a-14a).

court relied solely on an Aaacon case it had decided several months earlier, *Aaacon Auto Transport* v. *Rosenbaum*, holding that under both federal and state law the doctrine of *forum non conveniens* was inapplicable as a matter of law and that, under federal law, Aaacon's arbitration clause was enforceable. (6a-11a.) The relevance of CPLR 7503(c), although it was an issue in the case, was not discussed.

The shipper appealed to the New York Court of Appeals. That court affirmed, and directed enforcement of the arbitration clause, for the stated reason that Mrs. Newman and State Farm were allegedly precluded under CPLR 7503(c), from objecting to the validity of the clause. (1a-2a.)

III. History of the Contract Provisions Enforced by the New York Court of Appeals

On June 15, 1971, pursuant to 49 U.S.C. §317(a), the Interstate Commerce Commission had rejected from Aaacon's tariff filed with the Commission the very contract provisions here enforced by the New York Court of Appeals (R. 119-120, 124). See *Aaacon* v. *Romagnoli, supra* note 1, at 537 F.2d 656.

The rejection letter, over the signature of the Chief of the Section of Tariffs of the Commission, stated in part (R. 120, 124):

> To allow you by contract to restrict the venue of your customers throughout the country narrowly to arbitration in New York City thereby seeking to deprive injured plaintiffs of any use of the local process contemplated would be such a gross deterrent and constraint upon persons holding legitimate but disallowed claims against you as to constitute an unreasonable impediment to the obtaining of a determination of carrier liability and an unlawful attempt to limit such liability.

Notwithstanding this rejection, the carrier continued to insert these provisions in bills of lading issued to its customers (R. 125), including the one issued to Mrs. Newman seven months later.

In November 1973, after several weeks of hearings in several cities involving a wide variety of unlawful practices alleged against Aaacon, including its use of the arbitration clause here in issue, an Administrative Law Judge of the Interstate Commerce Commission found in a lengthy decision (R. 114-163), that the use of the clause by Aaacon was one of many "unjust and unreasonable practices in connection with matters relating to the transportation of automobiles, in driveaway service in interstate or foreign commerce, . . . all in violation of section 216(b) and sections 219 and 20(11) of the [Interstate Commerce] Act." *Aaacon Auto Transport, Inc.—Investigation and Revocation of Certificate*, No. MC-C-7287 (Nov. 30, 1973), at 13. (See the discussion of the Administrative Law Judge's decision in *Aaacon* v. *Romagnoli, supra* note 1, at 537 F.2d 650, note 1, and at 658-9.)

The Administrative Law Judge specifically found that Aaacon had been using the arbitration clause as a basis for instituting numerous proceedings in the New York courts identical to the one at bar, the "sole purpose" of which "was to create an unreasonable impediment to the determination of carrier liability on any claims, whether they be just or unjust." Decision at 11. The Administrative Law Judge also noted the June 15, 1971, rejection of Aaacon's arbitration clause by the Tariff Section of the Commission, *id.* at 5-6, 10, quoting that portion of the letter, among others, quoted above, and found as a fact that, despite the rejection, Aaacon was still using the clause, *id.* at 11.

In April 1976, the Interstate Commerce Commission, in another lengthy decision, affirmed the Administrative Law Judge. *Aaacon Auto Transport, Inc.—Investigation and Revocation of Certificate,* 124 M.C.C. 493 (1976), *pet. for review denied, sub nom. Aaacon Auto Transport, Inc.* v. *Interstate Commerce Commission,* 553 F.2d 93 (2nd Cir. 1977). The Commission expressly approved the Administrative Law Judge's findings of fact, 124 M.C.C. at 503, found that "the management of AAACon . . . is not *willing* . . . to comply with the appropriate laws, rules and regulations . . . ," *id.* at 509 (emphasis added), and expressly affirmed the finding that Aaacon's use of the arbitration provisions here at issue constituted one of many "unjust and unreasonable practices in connection with matters relating to the transportation of automobiles, in driveway service, in interstate or foreign commerce, in violation of sections 20(11), 219, and 216(b) of the Interstate Commerce Act. . . ." *Id.* at 509. A cease and desist order was issued on April 7, 1976. (See the discussion of the Commission's decision in *Aaacon* v. *Romagnoli, supra* note 1, at 537 F.2d 659.)

On June 9, 1976, the United States Court of Appeals for the Second Circuit expressly held, in still another lengthy opinion, that the specific standard-form provisions here enforced by the New York Court of Appeals were "unlawful" and "void" under the Interstate Commerce Act, 49 U.S.C. §§20(11) and 317(a), as constituting a prohibited limitation of liability and as a violation of the direct order of the Interstate Commerce Commission in 1971 rejecting the provisions from Aaacon's tariff. *Aaacon* v. *Romagnoli, supra* note 1. As implicitly recognized in *Aaacon* v. *Romagnoli,* the invalidity and unenforceability of Aaacon's arbitration clause under the Interstate Commerce Act also render the clause invalid and unenforceable under the

savings clause of the Federal Arbitration Act, 9 U.S.C. §2. (*See,* in this regard, 537 F.2d at 661, note 17.)

On March 4, 1977, the United States Court of Appeals for the Tenth Circuit, citing *Aaacon* v. *Romagnoli,* also declared these same contract provisions "unlawful and void" for the same reasons under the Commerce Act. *Aluminum Products Distributors, Inc.* v. *Aaacon Auto Transport, Inc.,* 549 F.2d 1381, 1384-5 (10th Cir. 1977).

IV. Stage and Manner in Which Federal Questions Were Raised

Throughout the state proceedings, it was undisputed by the parties, and repeatedly urged on the courts, that federal substantive law, as embodied in the Federal Arbitration Act and the Interstate Commerce Act, was applicable to the case, since the carrier's bill of lading related to a shipment in interstate commerce.

In the court of first instance, the applicable federal substantive law was called to the court's attention by introduction into the record of the full decision of the Administrative Law Judge (noted above at 9). In correspondence to the court dated March 8, 1974, enclosing a photocopy of the decision, the shipper pointed out that the Administrative Law Judge had found Aaacon's arbitration clause to be "unconscionable and in violation of law" and requested "that the court take judicial notice" of the decision (R. 164-5).

In addition, in Point I of her reply memorandum of law, and by correspondence dated February 6, 1974 (R. 109), the shipper argued that CPLR 7503(c) could not be applied to result in enforcement of Aaacon's arbitration clause if that result would be inconsistent with the applicable federal substantive law. The court was cited to *A/S J. Ludwig*

Mowinckels Rederi v. *Dow Chemical Co.*, 25 N.Y.2d 576 (1970). *Rederi* notes that the Supremacy Clause of the United States Constitution controls in this type of situation, 25 N.Y.2d at 584, and correctly synthesizes the law as explicated by this Court.

The court apparently accepted these arguments and authorities, referring to each of them in its opinion in dicta (13a-17a).

In her brief in the Appellate Division, the shipper renewed these arguments, citing the same authorities.

Further, the shipper extensively briefed the proposition that Aaacon's arbitration clause was unlawful and void under 49 U.S.C. §20(11). The authorities relied on were the same as those subsequently relied on by the Second Circuit in *Aaacon* v. *Romagnoli, supra* note 1.

The relevant point headings of the shipper's brief in the Appellate Division, and the pages in the brief where the points were discussed, were as follows:

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SINCE NEW YORK'S CPLR 7503(c) IS INCONSISTENT WITH FEDERAL LAW AND OUTCOME DETERMINATIVE, FEDERAL LAW APPLIES AND THUS DOES NOT BAR RESPONDENTS FROM ATTACKING THE VALIDITY OF THE ARBITRATION AGREEMENT. 19

THE LIMITATION OF THE VENUE IN WHICH AAACON IS LIABLE TO DEFEND MRS. NEWMAN'S CLAIM CONSTITUTES A LIMITATION OF LIABILITY *PER SE* AND IS THEREFORE UNLAWFUL UNDER 49 U.S.C. § 20(11). 21

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THE ARBITRATION CLAUSE IS ALSO A LIMITATION OF LIABILITY, PROHIBITED BY 49 U.S.C. § 20(11), SINCE THE VENUE LIMITATION ERECTS A SEVERE IMPEDIMENT TO THE PROSECUTION OF THE OUT-OF-STATE SHIPPER'S CLAIM. 27

The Appellate Division reversed, without discussing in its opinion any of the arguments or authorities relied on by the court below or by the shipper (3a).

In the New York Court of Appeals, the shipper again renewed her previous arguments, citing the same authorities, and specifically directed the court's attention to the decision of the United States Court of Appeals for the Second Circuit in *Aaacon* v. *Romagnoli, supra* note 1, which had been decided after the Appellate Division decision. Under a point heading reading

> CPLR 7503(c) CANNOT BE APPLIED AT BAR, SINCE IT WOULD DETERMINE THE OUTCOME OF THE LITIGATION OVER THE ENFORCEABILITY OF THE ARBITRATION CLAUSE WITHOUT REGARD TO THE APPLICABLE FEDERAL SUBSTANTIVE LAW

the shipper briefed the Court of Appeals as follows:

> Application of CPLR 7503(c) would result in enforcement of the carrier's arbitration clause, requiring the out-of-state shipper to come to New York City to arbitrate her relatively small claim.
>
> However, under the Interstate Commerce Act, 49 U.S.C. §§20(11) and 317(a), the shipper has the sub-

stantive right to sue the carrier in any convenient forum of her choice and to be totally free of the limitations imposed by the carrier's arbitration clause. *Aaacon Auto Transport, Inc.* v. *State Farm Mutual Automobile Ins. Co., subrogee of Joseph Romagnoli,* 537 F.2d 648, 653, 654-5, 658 (2nd Cir. 1976) (reproduced in full at SB Add. 1-25, and cited throughout these briefs as *Romagnoli*). *See* SB IX, SRB XII. Further, under the F.A.A., 9 U.S.C. §1 *et seq.*, there is no provision for a notice of intent to arbitrate nor any sanction for failure to respond to such a notice.

Accordingly, it is clear that application of our local rule, CPLR 7503(c), would limit the shipper's federal substantive rights and determine the result of this proceeding in a manner totally inconsistent with federal law.

Under these circumstances, it is crystal clear that CPLR 7503(c) is inapplicable to this case. *A/S J. Ludwig Mowinckels Rederi* v. *Dow Chemical Co.*, 25 N.Y.2d 576, 580, 581-2, 583-5 (1970). As this Court there stated (25 N.Y.2d at 581):

> [The] state court . . . cannot limit the substantive rights of the parties, nor, it seems, can it apply its own rules of procedures if those rules would significantly affect the outcome of the litigation, i.e., would be outcome determinative.

The carrier's argument (CB 43) that CPLR 7503(c) is applicable here because it is a mere rule of "procedure" must, in light of the above, be rejected.[6]

[6] Shipper's reply brief at 65-6. As noted above, *Rederi* cites the Supremacy Clause, 25 N.Y.2d at 584, and correctly synthesizes the law as explicated by this Court. (The opinion in *Rederi* was written by former Chief Judge Stanley H. Fuld, no longer on the court. Only two of the judges on the *Rederi* court remain.)

The issue relating to CPLR 7503(c) was treated in the shipper's reply brief, rather than initially, because it had not been relied on by the Appellate Division as a reason for enforcing Aaacon's arbitration clause and Aaacon had not cross-appealed from the Appellate Division's failure to rely on CPLR 7503(c). Aaacon raised the issue at the end of its respondent's brief in the Court of Appeals. Most of the briefs of both parties were concerned, not with the applicability of CPLR 7503(c), but with the question of whether the doctrine of *forum non conveniens* could be applied to a proceeding to enforce an arbitration clause such as Aaacon's, whether state or federal law was applicable on the issue of *forum non conveniens*, and what both state and federal law were on this issue. See note 11, *infra*.

Without discussing the arguments or authorities relied on by the shipper or the Supreme Court, New York County, the Court of Appeals enforced the arbitration clause, relying on CPLR 7503(c). (1a-2a.)

ARGUMENT

Since the United States Court of Appeals for the Second Circuit and the Interstate Commerce Commission Had Expressly Held That the Contract Provisions Here in Issue Violate the Laws of the United States, the Specific Enforcement of These Contract Provisions by the New York Court of Appeals, Relying on a Local Rule of Estoppel, Constitutes a Flagrant Violation of the Supremacy Clause and of the Applicable Decisions of This Court.

As is apparent from the foregoing Statement of the Case, Part III, the specific contract provisions here in issue are, and have been expressly held to be, "unlawful" and "void" under §§20(11) and 217(a) of the Interstate Commerce Act, 49 U.S.C. §§20(11) and 317(a), and invalid and unenforceable under these statutes as well as under the savings clause of §2 of the Federal Arbitration Act, 9 U.S.C. §2.[7]

[7] That this view is consistent with the probable view of this Court is noted in *Aaacon* v. *Romagnoli*, *supra* note 1, at 537 F.2d 655

The specific enforcement of these very contract provisions by the New York Court of Appeals, on the ground of the shipper's failure to comply with the local rule of estoppel embodied in CPLR 7503(c), which has no counterpart in federal law, thus defies the express language of the Supremacy Clause (Article VI, Clause 2) of the United States Constitution. Under the Supremacy Clause, the judges of the New York Court of Appeals are "bound" by the laws of the United States, *any* thing in state law to the contrary notwithstanding.

From a policy standpoint, it should be noted that if local rules such as CPLR 7503(c) were to be applied to the transactions of an interstate carrier such as Aaacon, it would be impossible to ensure that the carrier's relations with its customers were controlled by a uniform body of federal substantive law. The carrier could simply shop for a local forum whose technical rules of practice were most favorable to it and thus might succeed, precisely as it has done here, in circumventing the applicable federal substantive rules.

Also disquieting is the possibility that the present judges of the New York Court of Appeals failed to give proper weight to federal substantive law as interpreted by the United States Court of Appeals for the Second Circuit and by the Interstate Commerce Commission, or failed to take sufficiently seriously the necessity of adhering to the requirements of federal statutes as interpreted by those authorities, simply because this Court itself had not directly ruled on the validity of Aaacon's arbitration clause. It is obvious that many final interpretations of federal statutes are and must of necessity be made by the United

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citing the analogous case of *Boyd* v. *Grand Trunk Western Rd. Co.*, 338 U.S. 263, 265 (1949), as well as *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1973), and at 537 F.2d 661, note 17, citing *Wilko* v. *Swan*, 346 U.S. 427, 437 (1953).

States Courts of Appeals and the federal regulatory agencies, particularly in view of the heavy burden of cases currently shouldered by this Court and the entire federal court system. If federal law is indeed to be the "supreme Law of the Land", as mandated by the Supremacy Clause, the state courts must be required to respect seriously the federal substantive law rulings of federal authorities other than this Court, including the United States Courts of Appeals and the federal agencies.

In any event, the ruling of the New York Court of Appeals is totally inconsistent with the decisions of this Court. Indeed, the decisions of this Court rarely, if ever, deal with violations of the Supremacy Clause as egregious as the one at bar, where a state court of last resort, *with full knowledge of the applicable federal law,* has for reasons of local law deliberately placed its full weight and authority behind the specific enforcement of contract provisions expressly held, after exhaustive analysis by a United States Court of Appeals and a federal agency, to be unlawful, void, and unenforceable under the laws of the United States and repugnant to federal transportation policy.

In *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173 (1942), this Court was considering whether a state rule of estoppel could preclude the assertion that a patent was invalid under the federal patent laws and hence that a licensing agreement for the alleged invalid patent was unlawful under the federal anti-trust laws. The Court held, in languge quite relevant here (317 U.S. at 176-7):

> [T]he prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or common law rules. • • • To the federal statute and policy, conflicting state law and policy must yield. Constitution, Art. VI, cl. 2. . . .

> [L]ocal rules of estoppel will not be permitted to thwart the purposes of statutes of the United States.
>
> • • •
>
> Local rules of estoppel which would fasten upon the public as well as the petitioner the burden of an agreement in violation of the Sherman Act [read Interstate Commerce Act] must yield to the Act's declaration that such agreements are unlawful, and to the public policy of the Act which in the public interest precludes the enforcement of such unlawful agreements.

For present purposes, there is no significant difference between the local rule of estoppel at issue in *Sola Electric Co., supra,* where a litigant's affirmative act (signing of a patent license) was alleged to preclude a challenge to the validity of the patent involved, and the local rule of estoppel at issue here, where the shipper's omission to act (failure to make a motion within twenty days of service of Aaacon's Notice of Intention to Arbitrate) is alleged to preclude a challenge to the validity of Aaacon's arbitration clause.[8]

In *American Ry. Exp. Co.* v. *Levee,* 263 U.S. 19 (1923), reversing the Louisiana Court of Appeal, First Circuit, and holding that a limitation of liability valid under the Interstate Commerce Act must be enforced by state courts re-

[8] It should also be observed that Aaacon suffered no prejudice whatever because of petitioners' failure to respond to the Notice of Intention to Arbitrate. Presumably, the shipper could have responded by moving in the Illinois action, already pending, to stay arbitration on the ground that the arbitration clause, which the shipper was already ignoring, was a nullity under federal law. But no arbitration had yet been commenced. Following the shipper's failure to respond to Aaacon's notice, Aaacon did not initiate an arbitration but moved in New York, its preferred forum anyway, to stay the Illinois action and compel arbitration.

gardless of local rules relating to burden of proof, this Court declared (263 U.S. at 21):

> The law of the United States cannot be evaded by the forms of local practice.

This language was essentially repeated in *Brown* v. *Western Ry. of Alabama,* 338 U.S. 294, 296 (1949), reversing the Court of Appeals of Georgia in an F.E.L.A. case.

Brown, incidentally, typifies this Court's consistent rejection of any attempt to permit federal rights to be diluted by semantic debate over whether a particular state rule is substantive or procedural. The dissent in *Brown,* at 338 U.S. 301-3, argued that the pleading rules enforced by the Georgia court were to be characterized as rules of "procedure", were applied uniformly to all litigants in the Georgia courts, and did not therefore result in denial of a federal right, since plaintiff had "full knowledge of the niceties of pleading required by Georgia". *Id.* at 303. The majority obviously rejected this line of argument.

In *Davis* v. *Wechsler,* 263 U.S. 22 (1923), reversing a Missouri Court of Appeals decision and holding that a state rule of practice regarding waiver cannot be permitted to deprive a party in state court of rights arising under federal law, this Court held (263 U.S. at 24):

> Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.

This language has been repeatedly relied on by the Court in reversing state courts in a variety of contexts, *e.g.,*

Arnold v. *Panhandle & S.F. Ry. Co.*, 353 U.S. 360, 361 (1957), and *Brown* v. *Western Ry. of Alabama*, 338 U.S. 294, 298-9 (1949) (F.E.L.A. cases).

Exactly so at bar: Although CPLR 7503(c) may be relied on as a trap for the unwary "who are endeavoring to assert" state rights to be free of a particular arbitration clause, "the assertion of Federal rights" to be free of Aaacon's arbitration clause here at issue "is not to be defeated under the name of" the local practice requirements embodied in CPLR 7503(c).

Of course, whatever importance CPLR 7503(c) may have for New York practice, it cannot be permitted to interfere with the sweep of the Interstate Commerce Act. As this Court stated in *Free* v. *Bland*, 369 U.S. 663 (1962), in reversing the Supreme Court of Texas (369 U.S. at 666):

> The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail. Article VI, Clause 2. This principle was made clear by Chief Justice Marshall when he stated for the Court that *any state law*, however clearly within a State's acknowledged power, *which interferes with* or is contrary to *federal law, must yield.* [Emphasis added.]

Nor can it be argued that the shipper, by her failure to comply with CPLR 7503(c), "waived" the provisions of 49 U.S.C. §§20(11) and 317(a), under which the contract provisions here enforced are "unlawful" and "void". In *Kalb* v. *Feuerstein*, 308 U.S. 433 (1940), the aggrieved litigants *had totally failed*, in the state court proceedings foreclosing their property rights, to assert their federal rights to be free of the subject matter jurisdiction of the state court. Nevertheless, in reversing the Supreme Court of Wisconsin, this Court held (308 U.S. at 439):

> The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land.[9]

Finally, it should be noted that CPLR 7503(c) cannot be analogized to a statute of limitations.[10] (Who ever heard of a twenty-day statute of limitations?!) Statutes of limitations bar plaintiffs from asserting stale claims; they do not bar defendants from asserting defenses in actions

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[9] The word "void" in 49 U.S.C. §§20(11) and 317(a), in conjunction with the words "unlawful" in those sections, suggests that no act or omission of the shipper could "waive" the shipper's federal rights, breathe life into Aaacon's arbitration clause, or permit a New York court to enforce the clause, particularly after the decision of the United States Court of Appeals for the Second Circuit in *Aaacon* v. *Romagnoli, supra* note 1. *Cf. McMullen* v. *Hoffman*, 174 U.S. 639, 654 (1899); *Coppel* v. *Hall*, 74 U.S. (7 Wall.) 542, 558-9 (1868); *Griffin* v. *Smith*, 101 F. 2d 348, 349 (7th Cir. 1938), *cert. den.*, 308 U.S. 561 (1939); *National Union Indem. Co.* v. *Bruce Bros.*, 44 Ariz. 454, 464, 38 P. 2d 648, 652 (1934).

Further, all CPLR 7503(c) purports to do is preclude the shipper from "objecting that a valid agreement was not made". The statute does not authorize the court affirmatively to enforce agreements the court knows are "unlawful" and "void" under the laws of the United States. In this regard, even if the shipper had totally failed to point out the applicable federal law, as the aggrieved litigants had done in *Kalb* v. *Feuerstein*, 308 U.S. 433, *supra*, the New York Court of Appeals under CPLR 4511(a) would still have been required, "without request", to take judicial notice of the Constitution and laws of the United States.

[10] Applicable state statutes of limitations, when not unreasonably short, may be applied to causes of action under federal substantive law, when the federal law itself contains no statute of limitations, since otherwise the cause of action would remain perpetually viable, long after witnesses are dead and memory lost. *Campbell* v. *Haverhill*, 155 U.S. 610, 615-17 (1895). (*But compare Holmberg* v. *Armbrecht*, 327 U.S. 392 (1945), refusing to be bound by the applicable state statute of limitations, even of ten years, where the proceedings were, as here, in equity.)

brought within the statute of limitations. In the proceedings instituted by Aaacon in New York, out of which this petition arises, the shipper was in the role of *defendant*, not plaintiff.

Moreover, no court applying a state statute of limitations to a plaintiff on a federal cause of action has ever suggested that state legislatures have the authority, for any reason, to vest state courts with power affirmatively to enforce contracts that are "unlawful" and "void" under federal law.

The jurisprudential principles governing this case were well stated by this Court in *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239 (1942), in reversing the Pennsylvania Supreme Court and holding that state rules on burden of proof, even if applied uniformly to all litigants in the state court, could not be applied when the effect of such application would impair federal substantive rights arising under the Jones Act (317 U.S. at 245):

> The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. . . . So here . . . the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected.[11]

[11] This quotation, of course, has a well established corollary—that procedural questions that do not affect the merits, or the substantive outcome, are governed solely by state law in state courts, even if federal substantive law is applicable. This principle is stated here to point out that there are other federal questions, besides the Constitutional one, that this Court might wish to comment on if it reviews this case.

First, the Appellate Division here, and perhaps the Court of Appeals, was obviously confused as to whether state or federal law was applicable on the question of *forum non conveniens*, citing only federal authorities for the proposition that *"forum non conveniens* does not apply where, as here, a 'special venue act' is invoked. *Baltimore & Ohio R. R. Co.* v. *Kepner*, 314 U.S. 44. . . ." (See *Aaacon* v. *Rosenbaum*, at 50 A.D.2d 182, appended to this petition, at 9a-10a.) This Court has already reversed one state court on the question of *forum non conveniens*. *Southern Ry. Co.* v. *Mayfield*, 340 U.S. 1, 3-5 (1950). Apparently, once is not enough. (The shipper relied extensively on *Mayfield*, in all three state courts, for the proposition that the shipper's motion to dismiss on grounds of *forum non conveniens* was governed solely by state law (CPLR 327), even though federal substantive law was applicable.)

Second, this Court might wish to take the opportunity to point out affirmatively that, in federal courts, the doctrine of *forum non conveniens* is as applicable to applications to enforce arbitration agreements, even those with limited venue provisions such as Aaacon's, as in any other action or proceeding. This point is a matter of some concern in light of *Aaacon Auto Transport, Inc.* v. *Ninfo*, 490 F.2d 83 (2d Cir. 1974). *Aaacon* v. *Ninfo* stated as a matter of law that 28 U.S.C. §1404(a), the federal *forum non conveniens* statute, could not be applied to Aaacon's petition under 9 U.S.C. §4 to enforce its arbitration clause, in view of the venue limitation in the clause. *Ninfo* was relied on by the Appellate Division below (see the appendix to this petition at 9a-10a).

Aaacon v. *Ninfo* is obviously bad law. It outrages common sense that a party could be able to impose inconvenient and inappropriate venue on an adversary, for testing the validity of an arbitration clause in an adhesion contract, by inserting a venue provision in the arbitration clause which, by virtue of the limited venue provision or for other reasons, might be determined on the merits, as in the case at bar, to be entirely null, void, and unenforceable *ab initio!* Moreover, 28 U.S.C. §1404(a) provides for transfer of *"any* civil action to any other district or division where it might have been brought." Emphasis added. This Court has already held that the word "any" in §1404(a) means just that. *Ex Parte Collett*, 337 U.S. 55 (1949), pointing out (at 57-8, 60-1) that 28 U.S.C. §1404(a) legislatively overruled *Baltimore & Ohio R.R. Co.* v. *Kepner, supra*, and related cases, relied on by the Appellate Division at Aaacon's urging. A motion to enforce an arbitration agreement, even one with a limited venue provision, can, technically speaking, be brought in *"any* United States District Court which, *save for such agreement*, would have jurisdiction. . . ." 9 U.S.C. §4; emphasis added. The statutes thus make clear that any motion to enforce an arbitration agreement, even one with a limited venue provision, can be transferred, "for the convenience of parties and witnesses, in the interest of justice", 28 U.S.C. §1404(a), to

In light of the foregoing review, petitioners submit that the decision of the New York Court of Appeals constitutes

a flagrant violation of the Supremacy Clause and of the decisions of this Court. Because of the importance of the Supremacy Clause in the functioning of the federal system, this violation should not be permitted to go unnoticed or uncorrected.

CONCLUSION

This Petition for Review Should Be Granted, Since the Supremacy Clause Mandates That the Laws of the United States Shall Be the *Supreme* Law of the Land, *Any* Thing in State Law to the Contrary Notwithstanding.

Respectfully submitted,

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any other "District Court which, save for such agreement, would have jurisdiction . . .", 9 U.S.C. §4. Any possible prejudice feared on account of a transfer, in relation to Aaacon's alleged right to arbitration in the venue provided in the agreement if the agreement and the venue limitation were found valid by the transferee court, could be avoided by conditioning transfer on an appropriate stipulation. (These points were all painstakingly explained, with appropriate citations, in the appellate courts below.)

APPENDIX

APPENDIX

Opinion and Decree of New York Court of Appeals in *Aacon Auto Transport, Inc.* v. *State Farm Mutual Automobile Insurance Co. and Ruth Newman*, 41 N.Y.2d 951 (1977) (entered Mar. 29, 1977; No. 147)

In the Matter of the Arbitration between AACON AUTO TRANSPORT, INC., Respondent, and STATE FARM MUTUAL AUTOMOBILE INSURANCE Co. et al., Appellants.

Argued February 16, 1977; decided March 29, 1977

Arbitration—stay—effect of failure to time move for stay.

Matter of Aacon Transp. (State Farm Mut. Auto Ins. Co.), 52 AD2d 529, affirmed.

APPEAL from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered April 12, 1976, which (1) reversed, on the law, an order and judgment (one paper) of the Supreme Court at Special Term (MARTIN B. STECHER, J.), entered in New York County, denying an application by petitioner to stay appellants, pending arbitration, from proceeding in an action commenced by them in the State of Illinois, and granting a cross motion by appellants for a dismissal, on the ground of *forum non conveniens*, of the proceeding to stay them from proceeding with their action, (2) granted petitioner's application, and (3) directed the parties to proceed to arbitration.

WALTER WILLIAMSON for appellants.

Opinion and Decree of New York Court of Appeals

RALPH J. ZOLA for respondent.

MEMORANDUM. The order of the Appellate Division should be affirmed.

The appellants were served by certified mail with a properly drawn notice of intention to arbitrate by the respondent and they voiced no objection. Thereafter the respondent moved, by order to show cause, to compel arbitration and appellants cross-moved to dismiss on *forum non conveniens* grounds (CPLR 327).

Pursuant to CPLR 7503 (subd. [c]) appellants were "precluded from objecting that a valid agreement was not made or has not been complied with" by their failure to move to stay the proceedings within 20 days of their receipt of the notice of intention to arbitrate (see *Matter of Jonathan Logan, Inc.* [*Stillwater Worsted Mills*], 31 AD2d 208, affd 24 NY2d 898). They therefore are prohibited at this juncture from seeking to dismiss the proceeding to compel arbitration on the ground of the infirmity of the agreement to arbitrate.

Chief Judge BREITEL and Judges JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and COOKE concur.

Order affirmed, without costs, in a memorandum.

Opinion of the Appellate Division, First Department, in *Aacon Auto Transport, Inc.* v. *State Farm Mutual Automobile Insurance Co. and Ruth Newman*, 52 A.D.2d 529 (1976) (No. 2153-N)

In the Matter of the Arbitration between AACON AUTO TRANSPORT, INC., Appellant, and STATE FARM MUTUAL AUTOMOBILE INSURANCE Co. et al., Respondents-Respondents.

—Order and judgment (one paper), Supreme Court, New York County, entered on June 18, 1974, denying petitioner's application to stay respondents from proceeding in a certain action commenced by them in the State of Illinois and granting respondents' cross motion for an order dismissing the proceeding on the grounds of *forum non conveniens*, unanimously reversed, on the law, and vacated, and petitioner's application granted, for the reasons stated in *Matter of Aacon Auto Transp., (Rosenbaum)* (50 AD 2d 180). Appellant shall recover of respondents $40 costs and disbursements of this appeal. Settle order on notice. Concur—Stevens, P. J., Markewich, Murphy, Silverman and Capozzoli, JJ.

Order of the Appellate Division, First Department, in *Aaacon Auto Transport, Inc.* v. *State Farm Mutual Automobile Insurance Co. and Ruth Newman* (entered April 12, 1976; No. 2153-N)

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on , 1976.

PRESENT:

HON. HAROLD A. STEVENS,
Presiding Justice,
ARTHUR MARKEWICH,
FRANCIS T. MURPHY, JR.,
SAMUEL J. SILVERMAN,
LOUIS J. CAPOZZOLI,
Justices.

In the Matter of the Arbitration between AAACON AUTO TRANSPORT, INC. and STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.

Petitioner Aaacon Auto Transport, Inc. having appealed to this Court from an order and judgment (one paper) of the Supreme Court, New York County (Stecher, J.), entered June 18, 1974, denying appellant's application to compel arbitration and to stay respondents from proceeding with an action commenced by them in the State of Illinois, pending said arbitration, and granting respondents' cross-motion for an order dismissing the proceeding on the grounds of forum non conveniens, and the appeal having been argued by Ralph J. Zola, Esq., of

Order of the Appellate Division, First Department

counsel for petitioner and by Walter Williamson, Esq., of counsel for respondents, and due deliberation having been had thereon, and upon the Memorandum Decision of this Court filed herein, it is hereby unanimously

ORDERED, that the order and judgment (one paper) of the Supreme Court, New York County (Stecher, J.) entered June 18, 1974 be reversed on the law, and the same hereby is reversed on the law, with $40.00 costs, plus disbursements of this appeal, to be paid by respondents to petitioner, and it is further

ORDERED, that petitioner's application, pursuant to CPLR 7503, be granted in entirety, and the same hereby is granted in entirety, and it is further

ORDERED, that the parties hereto are directed to arbitrate any and all disputes and controversies between them, pursuant to the terms and conditions of the agreement entered into among them on or about February 17, 1972, and it is further

ORDERED, that, pending said arbitration, the respondents are stayed and enjoined from proceeding in any manner whatsoever in the action commenced by them against petitioner in the Circuit Court of Cook County, State of Illinois.

ENTER:

/s/ FM
Justice

FILED
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APPELLATE DIVISION,
FIRST DEPARTMENT

Opinion of the Appellate Division, First Department, in *Aaacon Auto Transport, Inc.* v. *Rosenbaum*, 50 A.D.2d 180 (1975)

In the Matter of the Arbitration between AAACON AUTO TRANSPORT, INC., Appellant, and HARRY ROSENBAUM et al., Respondents.

First Department, December 18, 1975

Courts—jurisdiction—application to compel arbitration and to stay action commenced in Colorado against petitioner, domestic corporation, to recover or damage to automobile in transit from Colorado to California, granted —petitioner is motor carrier licensed by Interstate Commerce Commission—Federal law must be applied—under Federal law agreement to arbitrate in jurisdiction other than location of litigation is lawful—doctrine of forum non conveniens not applicable.

1. Petitioner, a domestic corporation, and the individual respondents, residents of Colorado, entered into an agreement pursuant to which petitioner was to transport their automobile from Colorado to California. Their agreement provided that "[d]river and shipper [owner] consent to the personal jurisdiction of New York State and Federal Courts" and that any dispute "shall be settled by arbitration in New York City." The shippers alleged that thereafter their vehicle had been damaged in transit and their claim was paid by their insurer respondent herein. An action was then commenced in Colorado against the petitioner herein to recover for such damage. Petitioner's

Headnotes of Official Report of Opinion of the Appellate Division, First Department, in Aaacon v. *Rosenbaum*

application to compel arbitration and to stay the Colorado law action should be granted.

2. Petitioner is a motor carrier licensed by the Interstate Commerce Commission to transport automobiles throughout the United States and the instant case involves an agreement between the parties to transport a motor vehicle in interstate commerce. Under such circumstances Federal—not State—law must be applied.

3. Under Federal law, a bill of lading agreement to arbitrate in a jurisdiction other than the one in which a shipper claimant has commenced litigation is lawful and proper.

4. The New York court has neither the authority nor the power to refer the matter for decision to another court, particularly to a court in another State.

5. The doctrine of *forum non conveniens* does not apply where, as here, a "special venue act" is invoked.

6. The referral to a Colorado court of a claim by a New York citizen of a right to arbitration may effectively deny it any relief whatsoever.

APPEAL from a judgment of the Supreme Court (HARRY B. FRANK, J.), entered May 5, 1975 in New York County, denying petitioner's application to compel arbitration and to stay respondents from proceeding with an action commenced in Denver, Colorado.

RALPH J. ZOLA of counsel (Michael G. Ames with him on the brief; ZOLA & ZOLA, attorneys), for appellant.

ARTHUR OXENBERG for respondents.

MURPHY, J. On or about January 7, 1974, petitioner, a domestic corporation, and respondents Dorothy and Harry Rosenbaum, residents of Colorado, entered into an agreement pursuant to which petitioner was to transport the Rosenbaum's automobile from Denver Colorado, to Palm Springs, California. The agreement (and other related documents) provided, *inter alia,* that "[d]river and shipper [owner] consent to the personal jurisdiction of New York State and Federal Courts" and that "[a]ny claim or controversy, whether founded in contract or tort, arising out of or relating to this agreement or the performance or breach thereof shall be settled by arbitration in New York City."

The Rosenbaums thereafter alleged that their vehicle had been damaged in transit and their claim was paid by their insurer respondent Ohio Casualty Insurance Co.

An action was then commenced in Colorado, presumably at the instance of the insurer subrogee, against the petitioner herein, to recover for such damage.

Contemporaneously, petitioner served all three respondents with notices of intention to arbitrate (CPLR 7503, subd [c]). No motion was thereafter made to stay the requested arbitration; and the instant proceeding was then initiated to compel arbitration and to stay respondents from proceeding with their Colorado law action. Special Term, relying on the doctrine of *forum non conveniens* "decline[d] to accept jurisdiction" of the dispute and dismissed the petition. For the reasons hereinbelow stated, we believe such determination must be reversed.

It is undisputed that petitioner is a motor carrier licensed by the Interstate Commerce Commission to transport automobiles throughout the United States and that

the instant case involves an agreement between the parties to transport a motor vehicle in interstate commerce.

Under such circumstances Federal—not State—law must be applied (*Adams Express Co.* v. *Croninger,* 226 US 491; see, also, *Atchison, Topeka Ry.* v. *Harold,* 241 US 371; *Cincinnati & Texas Pacific R. R.* v. *Rankin,* 241 US 319; *Kansas City Southern R. R.* v. *Van Zant,* 260 US 459; *Matter of Rederi* [*Dow Chem. Co.*], 25 NY2d 576); particularly since the Carmack Amendment to the Interstate Commerce Act (US Code, tit 49, § 20, subd [11]) governs all shipper claims against interstate carriers. (*Sylgab Steel & Wire Corp.* v. *Strickland Transp. Co.,* 270 F Supp 264.)

Under Federal law, a bill of lading agreement to arbitrate in a jurisdiction other than the one in which a shipper claimant has commenced litigation is lawful and proper. (Cf. *Indussa Corp.* v. *S./S. Ranborg,* 377 F 2d 200; *Kurt Orban Co.* v. *S/S Clymenia,* 318 F Supp 1387; *Aaacon Auto Transp.* [*Teafatiller*], 334 F Supp. 1042.)

While Special Term (in a view shared by our dissenting brothers) was understandably concerned about retaining jurisdiction of a matter with little, if any, nexus with New York, under the legislative mandate of the CPLR (art 75) and the Federal Arbitration Act (US Code, tit 9, § 1 *et seq.*) it appears that we have neither the authority nor the power to refer the matter for decision to another court, particularly to a court in another State.

This conclusion follows from the fact that, under both the Federal and the New York State arbitration acts, petitioner was required to bring the instant proceeding in New York County, where any relevant issue for court determination was to be speedily tried. (CPLR 7502, 7503; US Code, tit

9, § 4; *Aaacon Auto Transp.* v. *Ninfo,* 490 F2d 83; *Lawn* v. *Franklin,* 328 F Supp 791.) In short, the doctrine of *forum non conveniens* does not apply where, as here, a "special venue act" is invoked. (*Baltimore & Ohio R. R. Co.* v. *Kepner,* 314 US 44; *Industrial Y Frutera Columbiana, S. A.* v. *The Brisk,* 195 F2d 1015; *O'Connor* v. *Yardley Golf Club,* 79 F Supp 264.)

Finally, since a court will generally not compel one of its citizens to arbitrate in a foreign jurisdiction *(Matter of Inter-Ocean Food Prods.,* 206 App Div 426; *Continental Grain Co.* v. *Dant & Russell,* 118 F2d 967) the referral to a Colorado court of petitioner's claim of a right to arbitration may effectively deny it any relief whatsoever.

Accordingly, the order and judgment (one paper) of Supreme Court, New York County (FRANK, J.), entered May 5, 1975, should be reversed, on the law, with costs, and petitioner's application granted.

Settle order on notice.

NUNEZ, J. (dissenting). We would affirm. We conclude that appellant has not demonstrated that Special Term abused its discretion in refusing to accept jurisdiction of the transaction sued upon which has no relationship whatsoever with New York. The contract was executed in Colorado by Colorado residents; performance thereof was undertaken in Colorado. The Colorado court, in which an action is pending, is a more appropriate forum to deal with petitioner's claim of a right to arbitration. We see no compelling reason for our overburdened courts to accept jurisdiction in this dispute between Colorado residents. Special Term's refusal to so do is supported by sound public policy and should be upheld.

MARKEWICH, J.P., and LUPIANO, J., concur with MURPHY, J.; KUPFERMAN and NUNEZ, JJ., dissent in an opinion by NUNEZ, J.

Order and judgment (one paper), Supreme Court, New York County, entered on May 5, 1975, reversed, on the law, and petitioner's application granted. Appellant shall recover of respondents $40 costs and disbursements of this appeal.

Settle order on notice.

Opinion of the Supreme Court, New York County, in *Aacon Auto Transport, Inc.* v. *State Farm Mutual Automobile Insurance Co. and Ruth Newman*, 77 Misc.2d 1069 (1974) (No. 14729/73)

In the Matter of the Arbitration between AACON AUTO TRANSPORT, INC., Petitioner, and RUTH NEWMAN et al., Respondents.

Supreme Court, Special Term, New York County,
April 4, 1974.

Arbitration—forum non conveniens—provision requiring arbitration in New York was inserted by interstate motor carrier in its bill of lading, which was signed in Illinois by Illinois resident, for transportation of her automobile from Illinois to California; carrier's application to enjoin her lawsuit in Illinois court for damages to her car should be made to Illinois court, not New York court (CPLR 327).

In a bill of lading drawn by an interstate motor carrier, and signed in Illinois by an Illinois resident, for the safe transportation of her automobile from Illinois to California, the validity and enforceability of a well-hidden and possibly unconscionable provision requiring that any claim for damage to the car be arbitrated in New York, is governed, not by our arbitration statute (CPLR 7503) but by the provisions of the Federal Arbitration Act (U. S. Code, tit. 9, §§2, 3, 4); and in this situation and on the ground of *forum non conveniens* (CPLR 327) the New York courts will decline to restrain her and her insurance company as her subrogee from suing the motor carrier in the courts of Illinois. The motor carrier may make such application to the Illinois court.

ZOLA & ZOLA for petitioner. WILLIAMSON & WILLIAMSON for respondents.

MARTIN B. STECHER, J. Respondent Newman, now a resident of California, instituted an action in the courts of Illinois for damages sustained to her car in Illinois while it was being transported from her then home in Illinois to California by an agent of the petitioner. Petitioner here seeks a judgment restraining Mrs. Newman and her insurance company-subrogee from prosecuting the action in Illinois, by virtue of an arbitration clause contained in one of the documents. The respondent, in turn, moves for dismissal on the ground of *forum non conveniens* (CPLR 327; *Silver* v. *Great Amer. Ins. Co.*, 29 N Y 2d 356).

Mrs. Newman, in Illinois, signed an agreement to have the petitioner transport her car to California. The agreement contained no arbitration clause but did contain a provision binding her to the terms of a bill of lading not then exhibited to her. Some days later, an agent of the petitioner arrived at Mrs. Newman's home to pick up the car and brought with him a bill of lading which she signed. It was densely worded. Unrelated sentences followed each other unrelentingly until, to any but the experienced reader of practiced obfuscation, meaning was lost in a solid wall of type. At the very end of this portion of the bill of lading appeared the following language: "Any claim or controversy whether founded in contract or tort, arising out of or relating to this agreement or performance or breach thereof, is non-assignable and shall be settled by arbitration in New York City. Upon said arbitration the arbitrator's jurisdiction shall be limited to enforcement and application, without exception of the provisions of this agreement and, at the request of any

party, of the rules and laws of evidence of the state in which said arbitration is held. Should the arbitrator vary or fail to apply and enforce, strictly, any provision of this agreement, or said rules and laws of evidence, for any reason whatsoever, said arbitrator shall be ousted of jurisdiction, and any award made by said arbitrator shall be null and void, and thereafter arbitration shall be recommended in accordance herewith."

The petitioner, which advertises itself as having offices and agencies in every State of the Union in over 100 cities and in more than 20 listed major cities, apparently follows the procedures above described as its usual method of doing business. It excludes the arbitration clause from it contracts—the time when the customer is most likely to pay more careful attention to the language of the agreement which he or she signs—and inserts this rather odd arbitration clause in the bill of lading when the customer has psychologically concluded that he or she has already signed the agreement negotiated and, in every case, regardless of where the contract or performance occurs and despite the absence of any relationship between this State and the transaction, requires the would-be litigant to come to New York for determination of the dispute. (I draw these conclusions from the unrebutted affidavit submitted on behalf of the respondent, showing more than a score of such proceedings brought in this very court, as well as from the record before and the decision of the Hon. Joseph A. Reilly, Administrative Law Judge of the Interstate Commerce Commission, dated November 15, 1973 submitted as an exhibit on behalf of the respondent.) I also note that in at least one case where the petitioner was the defendant in an action in the Small Claims Part of the Civil Court in Bronx County, it made its motion

for a stay not in the court in which the action was pending and which had jurisdiction over the proceeding but in the Supreme Court in New York County (*Aaacon Auto Transp.* v. *Roth*, N. Y. L. J., May 23, 1973, p. 19, col. 3).

Clearly, the transaction between the parties was in interstate commerce and, if the arbitration clause is enforceable, it is governed not by article 75 of the CPLR but by the provisions of the Federal Arbitration Act (U. S. Code, tit. 9). Although the petitioner urges the application of the Federal Arbitration Act, it simultaneously seeks to strike the respondent's motion to dismiss the petition, on the grounds of untimeliness under New York law (CPLR 7503, subd. [c]). It argues that this section of the CPLR is applicable because it is "merely" procedural. The statute is, however, "outcome determinative" and to allow it to be applied here would be inconsistent with the requirement that the Federal statute control (U. S. Code, tit. 9, § 2; *Matter of Rederi* v. *Dow Chem. Co.*, 25 N Y 2d 576, 585). The petitioner cannot have it both ways. The Federal Arbitration Act should apply and under it questions of timeliness are not for the court but for the arbitrator. Exclusive of the issue of jurisdiction, the court under the Federal act may only pass upon the validity of the arbitration agreement and the refusal of the parties to arbitrate (U. S. Code, tit. 9, § 4; *Matter of Rederi* v. *Dow Chem. Co.*, 25 N Y 2d 576, *supra*).

Nor is the petitioner's contention persuasive that the Federal statutes (U. S. Code, tit. 9, §§ 3, 4) are "special venue" statutes mandating the State courts to accept jurisdiction. These statutes and the various Rules of Federal Procedure cited by the petitioner apply to Federal District Court only. They are neither intended to apply to State courts nor do they by their terms apply to any

but the United States District Courts. (There is obviously no need to consider here whether the Federal rulemaking authority can obligate State courts to follow Federal procedures; but, see, *Southern Ry. Co.* v. *Mayfield*, 340 U. S. 1, 5.) It has been previously held that the considerations underlying the doctrine of *forum non conveniens* (convenience of parties, convenience of witnesses and convenience of the court) are applicable not only to actions at law but to proceedings such as the one at bar (*Matter of Aaacon Auto Transp.* v. *Feldman*, 77 Misc. 2d 120); and while I once had occasion to observe that in no reported case had a New York resident who was the original owner of a claim been denied access to the New York courts (*Propulsion Systems* v. *Avondale Shipyards*, 77 Misc. 2d 259), it is obvious from these facts that such a result is not only possible but necessary.

It is clear from the contract, the bill of lading, the record before the Interstate Commerce Commission, and the record of similar proceedings brought in this court, submitted on behalf of the respondent, that the petitioner is engaged in a unique form of forum shopping by contract drafting. Respondent, at the time the contract was signed, was an Illinois resident; the contract was signed in Illinois, and the witnesses to the execution of the contract, the bill of lading and the occurrences giving rise to the dispute have no relationship to the State of New York. New York's only relationship is the draftsmanship of the bill of lading containing a hidden arbitration clause. New York obviously has no relationship to this litigation.

There is great temptation here to entertain the application to dismiss the petition by virtue of the apparent unconscionability of the arbitration clause by virtue of the uncontested facts before me and by virtue of the record

of proceedings before the Interstate Commerce Commission. (Cf. Uniform Commercial Code, § 2-302; *Paragon Homes* v. *Carter*, 56 Misc. 2d 463, affd. 30 A D 2d 1052; *Nu Dimensions Figure Salons* v. *Becerra*, 73 Misc. 2d 140; *County Asphalt* v. *Lewis Welding & Eng. Corp.*, 444 F. 2d 372.) As a matter of public policy, however, where the courts of this State have no conceivable relationship to the dispute, they should in good conscience do nothing more than decline to accept jurisdiction. The State of Illinois is as well able to deal with the question of arbitrariness or the enforceable of the arbitration clause as is this court and under the circumstances here revealed, it will be permitted to do so. Therefore, conditioned upon the respondent's agreement in writing executed by her or her authorized agent or attorney delivered to the court and the attorney for the petitioner not to interpose a defense of untimeliness to an application which the petitioner may promptly make in Illinois for relief similar to that requested here, the motion to dismiss the petition is granted on the ground of convenience.

Order of the Supreme Court, New York County, in *Aaacon Auto Transport, Inc.* v. *State Farm Mutual Automobile Insurance Co. and Ruth Newman* (entered June 18, 1974; No. 14729/73)

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at 60 Centre Street, City and State of New York, on the 10th day of June, 1974.

Present:

HON. MARTIN B. STECHER,

Justice.

Index No. 14729-73 Our File No. S2271U

In the Matter of the Arbitration of Certain Differences Between AAACON AUTO TRANSPORT, INC.,

Petitioner,

—and—

STATE FARM MUTUAL AUTOMOBILE INSURANCE Co. and RUTH NEWMAN,

Respondents.

An order to show cause and petition having been made to this Court by Aaacon Auto Transport, Inc., the petitioner above named, for an order pursuant to CPLR 7503 enjoining and staying the respondents from proceeding in an action commenced against the petitioner in the State of Illinois; and a cross-motion having been made to this

Order of the Supreme Court, New York County

Court by respondents State Farm Mutual Automobile Insurance Company and Ruth Newman for an order pursuant to CPLR 327 dismissing the order to show cause and petition on the grounds of *forum non conveniens* and said motions having regularly come on to be heard,

Now, upon reading and filing the order to show cause dated August 20, 1973; the petition of Aaacon Auto Transport, Inc., verified by Ralph Zola on August 16, 1973; the affirmation of Michael G. Ames dated August 16, 1973; the affirmation of Albert S. Lefkowitz; respondents' notice of cross-motion dated November 1, 1973; the affidavit of Ruth Newman; the affidavit of Michael Hanrahan; the affidavit of Paul Newman; the answer of State Farm Mutual Automobile Insurance Company; the letter of Ralph J. Zola dated December 18, 1973; the letter of Paul A. Heyman dated December 20, 1973; the letter of Michael G. Ames dated January 16, 1974; the letter of Paul A. Heyman dated January 24, 1974; the letter of Ralph J. Zola dated January 31, 1974; the letter of Paul A. Heyman dated February 6, 1974; the letter of Ralph J. Zola dated February 8, 1974; the letter of Walter Williamson dated February 13, 1974; the letter of Albert S. Lefkowitz dated February 15, 1974; the letter of Paul A. Heyman dated March 8, 1974; the letter of Ralph J. Zola dated March 14, 1974; the letter of Albert S. Lefkowitz dated March 20, 1974; and after due deliberation having been made thereon,

Now, upon motion of Williamson & Williamson, attorneys for respondents, it is

ORDERED AND ADJUDGED, that the petition brought on by petitioner to stay the respondents from proceeding in the action commenced by them in the State of Illinois be and

Order of the Supreme Court, New York County

the same is hereby in all respects denied and the petition dismissed, and it is further

ORDERED AND ADJUDGED, that the cross-motion brought by respondents to dismiss the order to show cause and petition pursuant to CPLR 327 on the grounds of *forum non conveniens* be and the same is hereby in all respects granted, and it is further

ORDERED AND ADJUDGED, that the provision in the order to show cause enjoining and staying the respondents from proceeding with the action agains the petitioner in the State of Illinois be and the same is hereby vacated.

ENTER,

/s/ MBS
J.S.C.

Norman Goodman,
Clerk

FILED
June 18, 1974

NEW YORK
COUNTY CLERK'S OFFICE

Interstate Commerce Act §20(11), 49 U.S.C. §20(11)

(11) Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim.

Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory. or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading

has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however*, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed

upon in writing as the released value of the property in which case such declaration or agreement shall have no effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the Commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further*, That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further*, That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed

Interstate Commerce Act §20(11), 49 U.S.C. §20(11)

the claim or any part or parts thereof specified in the notice: *And provided further*, That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further*, That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided.

Interstate Commerce Act §217(a), 49 U.S.C. §317(a)

§317. Tariffs of common carriers by motor vehicle.

(a) Filing, posting, and publication.

Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

New York Civil Practice Law and Rules (CPLR) §7503(c)

(c) Notice of intention to arbitrate. A party may serve upon another party a demand for arbitration or a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice, or of an officer or agent thereof if such party is an association or corporation, and stating that unless the party served applies to stay the arbitration within twenty days after such service he shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time. Such notice or demand shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. An application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or he shall be so precluded. Notice of such application shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. Service of the application may be made upon the adverse party, or upon his attorney if the attorney's name appears on the demand for arbitration or the notice of intention to arbitrate. Service of the application by mail shall be timely if such application is posted within the prescribed period. Any provision in an arbitration agreement or arbitration rules which waives the right to apply for a stay of arbitration is hereby declared null and void.

Supreme Court, U. S.
FILED
AUG 22 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77/130

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.
and RUTH NEWMAN,

Petitioners,

-against-

AAACON AUTO TRANSPORT, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77/130

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. and RUTH NEWMAN,

Petitioners,

-against-

AAACON AUTO TRANSPORT, INC.,

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

QUESTIONS PRESENTED

1. Where petitioners defaulted by their failure to properly assert before a state court alleged invalidity of the venue clause in an arbitration agreement, does the preclusion of that issue by application of

state statutory law, resulting from said default, constitute a violation of the "supremacy clause" of the Constitution?

2. Where petitioners failed to raise a defense before a trial court, do the rules of said court, precluding petitioners from raising the issue upon appeal, constitute a violation of the "supremacy clause" of the Constitution?

3. Assuming arguendo, that a clause in arbitration agreement specifying the venue of arbitration were void as unlawful, would the enforcement of the severable remainder of the arbitration agreement constitute a denial of constitutional rights of the petitioners?

4. Where a motion for arbitration is filed in a court, do the provisions of state and federal arbitration acts which mandate that the venue of the hearing on arbitration and the arbitration itself be at the place the motion is filed, constitute a

denial of constitutional rights of the petitioners?

5. Where there is a split in the Circuits concerning the validity and enforceability of the venue portion of a contract in interstate commerce for arbitration, does the enforcement of the contract by the highest court of the State of New York constitute a denial of constitutional rights of the petitioners?

STATEMENT OF THE CASE

A. The Underlying Transaction

The agreement between respondent-carrier Aaacon Auto Transport, Inc. ("Aaacon") and petitioner-shipper Ruth Newman, consisted of two documents:

a. the "Freight bill-order form" -- which was admittedly signed by Newman. Her signature appears under the words in large capital letters, "SUBJECT TO AND INCORPORATING ALL PROVISIONS OF CARRIER'S BILL OF

LADING". This freight bill-order form (RA 27*) was merely an "order" and not the agreement as was erroneously characterized by the trial court.

b. the "bill of lading agreement" itself (RA 28) -- consisting of 28 lines of bold faced type -- between Aacon and Newman containing a provision for arbitration of claims at New York City (RA 28). The arbitration provision was printed in the bill of lading immediately above Newman's signature.

Newman signed both documents (RA 50, 51).

After the transport of the car, Newman asserted a claim for alleged damage to the vehicle. She was paid in full by automobile insurance in a policy issued by petitioner State Farm.

Newman is, therefore, merely a technical petitioner in the action. Her subrogee, State Farm, is the real party in interest as a result of the subrogation agreement between Newman and State Farm. (Hereinafter, "State Farm"

* "RA" indicates pages from the Record on Appeal to the New York Court of Appeals.

refers to petitioners Newman and State Farm collectively, unless otherwise indicated).

State Farm filed a claim with Aaacon. Subsequently, the claim was denied on the ground, inter alia, that Aaacon was entitled to the benefit of insurance under its tariff. Cf. U.S. v. Auto Driveaway, 464 F.2d 1380 (7th Cir. 1972).

The transportation had contacts with New York. As set forth, infra, the investigation of the claim was conducted by Aaacon's New York personnel (RA 96, 97). Correspondence, insurance policies and proof of loss were kept in the custody of Aaacon's New York personnel, Aaacon's tariff, and claims record entries were prepared by New York personnel (RA 96,97). The contract, the driver selection and payments were screened and approved by Aaacon's New York personnel (RA 96, 97).

Thus, New York had clear contacts with the dispute in question. No Aaacon employee in

Illinois was, or is, familiar with the issues or claim, or can testify with regard thereto. From State Farm's side the consignor Newman and the consignee Jack Snyder are both California residents and do not live in Illinois (RA 28, 53, 54). The Newman affidavit of October 16, 1973 (RA 47) submitted to the New York trial court was made in Los Anegles where Mrs. Newman resides. The driver in question, the other party to the contract, was a resident of Vermont. Clearly, Illinois is an inconvenient forum for the settlement of this dispute.

B. Procedures Seeking Arbitration

State Farm commenced an action in a state court in Chicago, Illinois to recover for said alleged damage to the Newman automobile.

On July 13, 1973, Aaacon served both State Farm and Newman with Notices of Intention to Arbitrate (RA 35). Said notices were served upon both petitioners in strict conformance with the New York

Arbitration Act, CPLR 7503(c). Each was served by certified mail, return receipt requested. Both petitioners failed to move within the required statutory period of twenty days to stay the demanded arbitration.

Aaacon then initiated the proceeding in the Supreme Court, New York County, Special Term Part I (hereinafter the "trial court") to compel arbitration in accordance with the terms and provisions of the agreement, the Federal Arbitration Act (9 U.S. Code Sec. 4) and the New York Arbitration Act (CPLR 7503) and further, to stay petitioners from proceeding with said Illinois action at law pending arbitration.

Contrary to State Farm's assertion in its Petition to this Court, State Farm opposed arbitration before the trial court <u>solely</u> on two grounds:

1. that Newman did not read the agreement (which she admittedly signed); and
2. that the contract was adhesive.

State Farm did not raise the question of invalidity of the contract to the trial court.* State Farm also sought to transfer a hearing of both of these issues to Illinois under the doctrine of forum non conveniens. Thus, as stated in the affidavit of one of State Farm's attorneys, Paul A. Heyman, Esq., dated October 31, 1973 (RA 62):

> "...the issues at bar are:
>
> (a) whether Mrs. Newman, an unknowing consumer can be bound by a grossly unfair arbitration clause buried in the uniform densly packed print of an adhesion contract, and
>
> (b) whether this proceeding should be dismissed under the doctrine of forum non conveniens, since Illinois is the only forum convenient to all the parties and witnesses in any litigation over the validity of the arbitration clause."

State Farm asserted a standardized sham allegation in affidavits it drafted for its

---

* State Farm dedicates 4 pages of its petition to this Court attempting to show that the issue of invalidity under 49 U.S. Code Sec. 20(11) was raised, but cannot cite any documents before the trial court to substantitate its position, except to refer to letters sent to the trial court 3 months after the matter was heard.

insureds including Mrs. Newman to the effect that they were "unaware" of the terms of the transportation agreement under which their vehicles were transported. For example, as noted on appeal, a comparison of paragraph 18 of the Newman "affidavit" (RA51) with an "affidavit" prepared by State Farm in another litigation against Aacon (Aacon Auto Transport, Inc. v. State Farm (Romagnoli)), 537 F.2d 648 (2d Cir. 1976), cert den., 45 U.S.L.W. 3643) reveals assertions that are virtually identical.

In the instant case, Newman swore in the October 16, 1973 affidavit (RA 51):

> "I do not recall whether or not I read any or all of the uniform, closely packed print on this form. If I did, then I did not see any provisions about arbitration."

In the other litigation against Aacon, State Farm's insured swore on April 19, 1974:

> "I do not recall whether or not I read any or all of the uniform, closely packed print on the reverse side of the freight bill

> "order form. I certainly never saw and was never apprised of any provision about arbitration."

This type of sham allegation has been condemned by various courts. Cf. Aero-Backer v. Allied (NYLJ, 3/4/76, p. 5, col. 1, 2, 3, Spec. Term, Part I, Supt. Ct. NY County); with National Equipment Rental Ltd. v. Szukhent, 375 U.S. 311 (1964).

Instead of deciding these issues, the trial court sent the matter to Illinois:

> "the State of Illinois is as well able to deal with the question of arbitrariness (sic) or the enforceability of the arbitration clause as is this Court..."

The Appellate Division, First Department reversed on the basis of its holding in a similar case, Aacon Auto Transport, Inc. v. Rosenbaum (Ohio Casualty Insurance Co.),50 AD.2d 180, 376 NYS.2d 548 (1st Dept. 1975),* annexed

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* The Appellate Division sent to the arbitrator all questions relating to the agreement between the parties, including all of the issues raised by State Farm before the trial court. Thus, whether the contract was "adhesive" and whether Newman was bound by the execution thereof are issues prpperly and

to State Farm's Petition to this Court Addenda 6a-11a.

Upon further appeal by State Farm, the New York Court of Appeals affirmed and held that State Farm, having failed to move before the trial court under CPLR 7503(c) for a stay of arbitration on the ground of invalidity, was precluded from raising that issue.

It is from this ruling that State Farm sought to petition this Court.

(cont) solely for the arbitrator to determine under both Federal and New York decisions. Prima Paint v. Flood & Conklin, 388 U.S. 395 (1967); John Wiley & Sons v. Livingston, 376 U.S. 543 (1964); Weinrott v. Carp., 32 NY.2d 190, 344 NYS.2d 838 (1973).

The rationale of the above-cited cases is that where a broad arbitration clause is included in an agreement between the parties, it is severable and it authorizes the arbitrator alone to determine any questions going to the making of the entire agreement. Robert Lawrence Co. v. Devonshire Fabrics Co., 271 F2d 402 (2d Cir. 1959), cert. den. 364 U.S. 801.

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REASONS FOR DENYING THE WRIT

The decision of the New York Court of Appeals did not involve a misapplication of federal law, much less a constitutional issue. The question before the New York Court of Appeals was whether State Farm, having defaulted in following the procedures set forth in New York CPLR 7503, was precluded from raising issues of invalidity of the contract. There is no question that State Farm was given due notice, due process and a fair opportunity to raise the question of invalidity. There is no question that federal law on the question of invalidity would be applied by the New York courts.

The case is simply the failure of petitioner to plead a federal defense in a state court action. The failure to plead under proper state procedural law simply bars the issue. There is, therefore, no question of the New York Court's failure to give full faith and credit to Federal law.

Moreover, under the language of the Federal Arbitration Act, 9 United States Code Sec. 4, and the New York State counterpart, CPLR 7501 et seq., even if the venue clause in the arbitration agreement was stricken, the rest of the clause would be enforceable under the terms of the two arbitration statutes aforementioned. The sole place where the remainder of the contract can be enforced is the district in which a petition for arbitration is filed -- in this case New York. Both parties were amenable to service of process in New York and both appeared through counsel. Jurisdiction was, therefore, vested in the New York courts and jurisdiction was never contested. Accordingly, even if the venue provision of the arbitration agreement is deemed void or unlawful, enforcement of the remainder of the contract requiring arbitration at the place where the petition is filed (in this case New York) is lawful and raises no constitutional issues.

Finally, State Farm's interpretation of the "federal law" is incorrect as is briefly discussed below.

SUMMARY OF THE ARGUMENT

The effect of New York CPLR 7503 which governs the procedural aspects of enforcement of arbitration requires a party upon whom a Notice of Arbitration is served to move within twenty days (the same period of time for answering a summons) to raise any question of the invalidity of the arbitration agreement. State Farm failed to do so in the instant case. The New York courts have not failed to apply the federal law and have merely applied New York procedures which, even State Farm acknowledges, is appropriate. These procedures in no way conflict with the federal law nor does their application raise a constitutional issue.

Additionally, State Farm, having failed to raise before the trial court the question of the invalidity of the venue of arbitration could not under the rules of proper practice, raise the issue upon appeal.

State Farm avers that the venue clause (providing for arbitration at New York City)

in the arbitration agreement is void under federal law. While Aacon avers that the federal law is not clear on this issue -- and that there is currently a split in the Circuits -- the venue clause if deemed void or stricken or otherwise severed from the rest of the arbitration agreement, is not necessary for the conclusion reached by the New York Court of Appeals. This results from the fact that the Federal Arbitration Act and the New York arbitration Act, 9 U.S. Code Sec. 4 and CPLR 7503 both provide that the place of arbitration shall be the forum in which a petition for arbitration is filed, regardless of any contract provision to the contrary or contractual silence on the issue. Had there been no venue provision in the arbitration agreement the hearing on arbitrability and the arbitration itself would have taken place at New York by Congressional mandate since a petition for arbitration was filed at New York. This, of course, assumes arguendo the invalidity of the venue provision and

assumes that State Farm had not defaulted in raising the issue.

Finally, Aacon respectfully notes that should this Court grant certiorari it will set forth in appropriate briefs a full discussion of the validity of the venue provision rather than burdening the Court with a full discussion of the question at this time.

POINT I

CPLR 7503 DID NOT PRECLUDE THE ENFORCEMENT OF FEDERAL LAW

State Farm asserts that the provisions of CPLR 7503 cannot be applied to limit the period of time within which to challenge the validity of the arbitration agreement.

It has been hornbook law from the earliest days of American jurisprudence to the present that Federal statutes will be enforced in state courts in accordance with state procedural rules. This is especially true where state law provides a period of limitation.* Shipp v. Miller, 15 U.S. 316 (1817); Cope v. Anderson, Ohio & Pa., 331 U.S. 461 (1947); Brenkmeir v. Missouri Pacific Ry Co., 224 U.S. 268 (1911); N.V. Phillips' Gloeilampnfabrieken v. Automic Energy Commission, 316 F2d 401

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* State Farm acknowledges to this Court in its Petition for Certiorari (p. 22 n. 11) annexed hereto as Addendum "1" that state court procedures govern the application of Federal substantive law. That is all that has occurred here.

(DC CA 1963); Moviecolor Ltd. v. Eastern Kodak Co., 288 F2d 80 (2d Cir. 1961) cert. den. 368 U.S. 821.

Importantly, CPLR 7503(c) does not, by its terms, preclude a party to an arbitration agreement from raising any issue concerning the validity of the agreement under state or federal law. It merely sets forth the period of time and pleading procedure for joining certain issues. CPLR 7503 is consonant with the substantive Federal law, permitting the parties to contest validity on any ground should they elect to do so.

In reality, what State Farm is faced with is not a statute precluding it from raising questions of validity, but rather its own default by its failure to follow procedures to assert its rights. Clearly, State Farm's right to raise the validity of the venue of arbitration is waivable by default, or by the application of rules of proper pleading. As noted by the New York

Court of Appeals, per Breitel, C.J., during cral argument, even Constitutional rights are so waivable. John v. Zerbst, 304 U.S. 458 (1938); Wall v. Parrot Silver & Copper Co., 244 U.S. 407 (1917).

The 20 day period of time in which to raise questions of the validity of arbitration agreements under CPLR 7503(c) is the same as the period within which to answer a summons under New York procedure. State Farm acknowledges it was properly served with a written notice which stated both the time within which to act and the consequences of a failure to do so. State Farm acknowledged in oral argument before the New York Court of Appeals that it had counsel both in Illinois where it was served, and in New York where the matter was to be heard. Accordingly, neither due process nor the application of a federal substantive law is at issue.

Since State Farm was given a fair opportunity to raise the issue of validity, its failure to do so does not place CPLR 7503(c) in conflict with federal law. It merely means State Farm has defaulted under the rules of procedure for New York State courts.

The cases relied on by State Farm, such as Kalb v. Feuerstein, 308 U.S. 433 (1940), do not hold to the contrary. The Court in Kalb held merely that under the Bankruptcy Act state courts are ousted of jurisdiction. In the instant case, the Federal Arbitration Act is enforceable in both state and federal courts. Further, the New York Arbitration Act is practically on all fours with its federal counterpart. Weinrott v. Carp, 32 NY2d 190, 344 NYS2d 838 (1973). Thus, exclusivity of federal jurisdiction is not at issue as it was in Kalb.

The other group of cases cited by State Farm, wherein federal law is applied to the exclusion of state law, deal mainly with

state laws which alter the liability of an employer under FELA by the application of state rules for determining negligence. For example, in Arnold v. Panhandle & S.F.R. Co., 353 U.S. 360 (1957) cited by State Farm, the Court held that based on the same facts, a federal court would have found different liability from that found by the state court. Such cases are irrelevant to the instant case since the issues herein are procedural only -- proper pleading -- and since the result arose solely from failure of State Farm to observe the law, and not from the application of different substantive rules than would obtain in a federal court.

Surely no one could challenge an FELA decision in favor of a defendant resulting from the plaintiff's default or where the plaintiff had failed to properly file pleadings in a state court hearing. So too in the instant case, CPLR 7503 deprived State Farm of no rights, nor did it alter the

federal substantive law concerning arbitration. It merely enunciated the method of proceeding -- which State Farm chose to ignore at its own peril.

POINT II

THE VENUE PROVISION, IF VOID AND DEEMED STRICKEN, IS NOT NECESSARY TO THE NEW YOUR COURT OF APPEALS' FINDINGS

State Farm avers the portion of the agreement covering the venue of arbitration is void as contrary to federal law. This is more fully discussed hereafter. However, if the provision for the venue of arbitration at New York were severed and stricken, or had there been no mention, ab initio, of the venue of arbitration in the agreement between the parties, Aaacon's petition to arbitrate herein, served and filed in the New York State Courts or New York Federal Courts would still automatically require an order directing arbitration in New York. This follows from the clear language of both the Federal and New York Arbitration Acts, 9 U.S.Code Sec. 4 and CPLR 7503 which mandate the venue of arbitration to be the place where a petition therefor is filed, regardless of contractual silence or even contractual agreements to the contrary. 9 U.S. Code Sec. 4; CPLR 7503; Aaacon v. Ninfo, 490 F2d 83 (2d Cir. 1974); and Continental Grain Co. v. Dant & Russel, 118 F2d 967 (9th Cir. 1941).

Congress and New York legislature have each mandated the place of arbitration. These legislative directives override any contractual agreement or discretionary rule to the contrary:

> "The question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be in the affirmative. Ant it is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty'.
>
> * * *
>
> Federal courts are bound to apply rules enacted by Congress with respect to matters--here, a contract involving commerce--over which it has legislative power." (Citations omitted) (Emphasis added)

Prima Paint vs. Flood & Conklin, 388 U.S. 395, 405, 406 (1966).

Congress not only preempted the venue issue by the enactment of the language of 9 U.S.C. Sec. 4, but intended it to extend to all arbitration arising out of interstate transportation:

> "...the control over the interstate commerce (one of the bases for the legislation) reaches not only the

"actual physical interstate shipment of goods but also contracts relating to interstate commerce."
HR Rep. No. 96 68th Cong. 1st Sess.1.
(Emphasis added)

Considering only the controlling Federal law, the Ninth Circuit Court of Appeals in Continental Grain v. Dant & Russel, 118 F2d 967 (9th Cir. 1941) has held that the legislature has the power to mandate to the courts the place of hearing issues on the making of an agreement to arbitrate as the place where a petition therefor is filed -- even though the parties had agreed to arbitration elsewhere:*

> "The statute expressly provides that the hearing and proceeding shall be within the district in which the petition for an order directing the arbitration is filed...
>
> * * *
>
> The appellant challenges the right of the court to order the arbitration within the district of Oregon because such an order does not conform to the agreement of the parties for an arbitration in New York....If there could be any

* The New York Arbitration statute CPLR 7501, et seq. contains practically identical language. Matter of Weinrott (Carp) 32 NY2d 190 (1973).

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> "doubt of the power of the legislature to limit the right of arbitration to one conducted within the jurisdiction of the district court ordering the arbitration, it must be dispelled by the consideration that Congress could attach any limitation it desired to the right to enforce arbitration in the federal courts, that it has made a condition that the arbitration be held in the district where the court sits, that the contract in question was executed with a knowledge that Congress had so provided, and that the appellant had invoked the jurisdiction of a court other than that having jurisdiction in New York to enforce the agreement." (Emphasis added)

Similarly, the Second Circuit in Farr & Co. v. Cia. Intercontinental de Navegation, 243 F2d 342, 346 (2d Cir. 1957) stated:

> "Section 4 of the Arbitration Act requires when parties have agreed to arbitrate, the arbitration be had in the district where the petition is filed. The parties are presumed to have contracted with notice of this venue provision, and since the arbitration was to take place in New York and 'This submission may be made a rule of court by either party', they consented to the jurisdiction of the district court in New York, where the petition was filed. Although New York cases are not controlling on us, their reasoning supports this conclusion." (Emphasis added).

Accord: Industrial Y Frutera Columbia v. The Brisk, 195 F2d 1015, 1016, 1017 (5th Cir. 1952).

More recently, the Second Circuit Court of Appeals in Aacon Auto Transport, Inc. v. Ninfo, 490 F2d 83 (2d Cir. 1974), in a unanimous decision, held that the Federal District Court in which the petition is filed under 9 U.S. Code Sec. 4 must hear issues of the making of the arbitration agreement and that motions for change of venue of the type sought by State Farm from the New York Court of Appeals, must be rejected as a matter of law.

The issue in Ninfo is on all fours with the issue herein. In Ninfo, respondent sought to attach the arbitration on the same grounds as State Farm raised below. Respondent also sought to have the venue of litigation on the issue of the making of the agreement transferred to another district under the Federal forum non conveniens statute, 28 U.S. Code 1404(a)*. In the instant case, State Farm seeks the same relief under the

* Contrary to State Farm's allegation to the New York Court of Appeals and as the reported case clearly indicates, the appeal in Ninfo was argued by attorneys for both sides and was not "unopposed".

New York forum non conveniens statute, CPLR 327.

The Second Circuit in Ninfo ruled, inter alia;

> "In the memorandum opinion below, the court indicated that the Ninfo affidavit in opposition to the Aaacon motion 'suggests' that there is a question as to whether or not the agreement was ever entered into, or if it was whether Ninfo realized that it called for arbitration of all disputes in New York County since the provision appeared inconspicuously toward the end of the boilerplace of the shipper's standard form which might render it invalid as against public policy. The court concluded that this presented issues of fact which need not be decided here, but could be resolved in the more convenient federal forum in Wisconsin. 9 U.S.C. Sec. 4 however, provides in pertinent part:
>
> 'The court shall hear the parties and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.'

> "Since the agreement on its face provides for arbitration in New York and since the petition was filed in the Southern District of New York, the statute mandates that the court below proceed summarily to a trial of the issues as to the making of the agreement. Aacon Auto Transport, Inc. v. Tearatiller, 334 F. Supp. 1042, 1044 (S.D.N.Y. 1971); Lawn v. Franklin, 328 F. Supp. 791, 793 (S.D.N.Y. 1971). It follows that the court below lacked the power to order the transfer of the case to Wisconsin. See Farrell v. Wyatt, 408 F.2d 662, 664-65 (2d Cir. 1969)." (Emphasis added)

The reasoning in Ninfo has never been rejected or distinguished by the Second Circuit or any other court. Accordingly, Ninfo is hardly the "dictum", nor has it "begun" to be "disowned" by the Second Circuit, as State Farm had averred in its brief to the New York Court of Appeals.

Although State Farm avers Ninfo to be "bad law" (Petition p. 23, n.11), China Union Lines v. Steamship of 1949, 136 F. Supp. 597 (SDNY 1955) and a long line of Federal cases heretofore cited support interpretation of the statute given by the Second Circuit in Ninfo. The Court in China Union Lines after quoting 9 U.S. Code Sec. 4 noted that an agreement

to arbitrate in New York would require arbitration in Texas where the petition to compel arbitration was filed in Texas:

> "...libellant filed its petition for an order directing arbitration in the Southern District of Texas. It did not file a similar petition in this district. The only district within which the arbitration could proceed by force of a petition and court order would be the Southern District of Texas." (Emphasis added)

The New York Appellate Division, First Department, has also followed this reasoning in Aacon Auto Transport, Inc. v. Harry Rosenbaum, 50 App. Div.2d 180, 376 NYS.2d 548 (1st Dept. December 1975):

> "...under the legislative mandate of CPLR (Art. 75) and the Federal Arbitration Act (9 U.S.C. ss 1, et seq.) it appears that we have neither the authority nor the power to refer the matter for decision to another court, particulary to a court in another State. (Emphasis added)

Accordingly, no Federal case or state case has ever been cited by State Farm nor has any authority been uncovered by Aacon which ever upheld an order changing the venue of a petition to compel arbitration where the petition was filed in a particular forum.

Thus, inasmuch as the parties were amenable to process in New York and appeared generally before the New York Courts, and inasmuch as the petition to arbitrate was filed in New York, the place of arbitration was mandated by statute to be New York--without any reference to the venue provision in the contract. Farr & Co. v. Air Intercontinental de Navagation, 243 F2d 342, 346 (2d Cir. 1957).

Clearly, therefore, assuming arguendo that under "federal law" the venue portion of the arbitration clause was void*; assuming

*All that the Second Circuit decided in Romagnoli, supra, is that a contract providing for arbitration at New York violated 49 U.S. Code Sec. 20(11).

The split in the Courts over this issue is discussed elsewhere herein. The correctness of the Second Circuit in Romagnoli will be briefed to this Court if the petition for certiorari is granted. It is sufficient to note at this point that respondent avers Romagnoli is incorrect as a matter of statutory construction and legislative intent. It should also be observed that the prospective effect of the New York Court's decision is moot since the venue of arbitration was permanently removed from Aacon's tariff and contracts in August, 1976.

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arguendo that this issue had been properly raised by State Farm before the trial court; and assuming arguendo that CPLR 7503(c) was not applicable--the Courts of New York rightly held the rest of the arbitration provision enforceable at New York where the petition was filed.

POINT III

STATE FARM ERRS IN CHARACTERIZING THE "FEDERAL LAW" AS HAVING DECLARED THE WHOLE ARBITRATION AGREEMENT BETWEEN THE PARTIES "A NULLITY"

State Farm's Petition for Certiorari is based upon the erroneous assumption that the arbitration agreement between the parties herein is a "complete nullity". This is an error. State Farm's averments do not represent "federal law". Moreover, the case State Farm relies on, Asacon v. Romagnoli, 537 F2d 648 (2d Cir. 1976) cert. den. 45 U.S.L.W. 3643 (1977), only deals with the venue portion of the arbitratiam provision, not the whole agreement to arbitrate.

State Farm has erred in its characterizations of the holdings of the Interstate Commerce Commission and of the Federal Court in Romagnoli. Nowhere has either tribunal ever declared that arbitration per se between a carrier and a shipper (or in this case, an insurer of a shipper) is precluded by Federal statute or by administrative

determination. On the contrary, the Interstate Commerce Commission has already put itself on record as holding that arbitration of shipper-carrier disputes is lawful. In Ex Parte 263, 340 ICC 515, 582 (1972) the Commission held that arbitration:

> "is not proscribed by any portion of the Interstate Commerce"

and that the Commission knew of:

> "no inherent impediments to placing arbitration clauses in bills of lading for separate execution." Id at 587. (Emphasis added)

The Commission's decision in Aaacon Auto Transport, Inc. Investigation & Revocation of Certificate, 124 MCC 506 (1976) specifically declined to adopt the hearing examiner's recommendation (which recommendation State Farm erroneously characterizes as a "Commission decision") on the lawfulness of providing for the venue of arbitration. The Commission stated at 506:

> "A resolution of the issues at hand does not, we believe, require us to determine whether...the incorporation

> "of an arbitration clause into Asacon's bill of lading is acceptable or even desirable."

The Commission went on to state that it was not ruling on the legality of the provision for venue of arbitration, but was only discussing the manner in which it was used in certain cases.

Similarly, the Second Circuit Court of Appeals in Romagnoli, supra, did not hold that the arbitration of shipper-carrier disputes was unlawful. Nor did it indicate that it would not enforce an arbitration agreement per se where a petition for arbitration was filed by a carrier at New York. The Second Circuit Court specifically confined itself to the lawfulness of the inclusion of a requirement that the venue of arbitration be at New York as a contract term. Thus, enforcement of arbitration itself is not against the federal law.

Until this Court makes a declaration concerning the validity of contracts providing for arbitration of interstate carrier-

shipper with venue specified, the states will seek to apply the law as they believe their courts should. La Bonte v. New York, N.H. & H. R. Co., 167 N.E.2d 629, 632, (S.Ct. Mass. 1960).

This is especially true where, as here there is a split in the Circuits. Thus, in Aacon v. Jacobson, 475 F2d 1394 (3rd Cir. 1973), the Third Circuit upheld the enforceability, validity and conscionability of the arbitration agreement here at issue against the same attack raised in the Second Circuit in Aacon v. State Farm (Romagnoli) - that it violated 49 U.S. Code 20(11). The issues raised before the Third Circuit in Jacobson were the identical issues considered by the Second Circuit in Romagnoli. In light of split in the Circuits, it is respectfully urged that an analysis of the Third Circuit decision in Jacobson is the correct one.*

* Contrary to the characterization of the Second Circuit in Aacon v. State Farm Romagnoli), 537 F.2d 648 (2d Cir. 1976),

As heretofore noted, assuming arguendo Romagnoli were deemed to represent the "federal law", that case only dealt with the venue portion of the arbitration agreement in any event. The doctrine of severability has long been applied to arbitration contracts. Robert Lawrence Co. v. Devonshire Fabrics Co., 271 F2d 402 (2d Cir. 1959) cert. den. 364 U.S. 801. Prima Paint v. Flood & Conklin, 388 U.S. 395 (1967). Cf. Kass Realty Corp. v. Stanley Company of America, 226 F2d 54 (DC Cir. 1955). Clearly, the enforcement of the rest of the arbitration agreement--to the exclusion of the severable venue provision--is proper. Ex Parte 263, 340 ICC 515, 582 (1972).

(cont.) cert. den. 45 U.S.L.W. 3643 (1977) the Third Circuit in Aaacon v. Jacobson, did not issue an order or opinion "from the bench". Rather, it issued a written opinion. Counsel for Aaacon has contacted the Third Circuit staff attorney, as well as its Philadelphia counsel, and it has been advised that the opinion of the Third Circuit is citable and binding. This conclusion accords with 12 ALR.3d 892, 897 that a decision upholding the enforeability of an arbitration agreement must of necessity, determin its validity of the law. The Second Circuit corrected this error by issuing an errata to its decision in Romagnoli.annexed hereto as addendum "2".

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State Farm has also sought to rely on a Commission employee's letter as setting forth "federal law" which it claims the New York Court of Appeals failed to be bound by. This letter was the basis of the Romagnoli decision which is at odds with Aacon v. Jacobson and which will be discussed at length should this Court grant certiorari. However, the 'McCarthy letter of 1971" was not an order of the Commission and was superseded by the Commission approval in 1972 of Aacon's tariff provision authorizing arbitration at a stated venue. Thus, in 1972 the Commission itself had approved and accepted Aacon's tariff provision Rule 20 authorizing the placement in Aacon's bill of lading of a provision for arbitration and the venue thereof (RA 167, 169).

Accordingly, neither the McCarthy letter, nor the hearing officer's recommendations in Aacon Auto Transport, Inc.--Investigation

and Revocation of Certificate, 124 MCC 493 (1976), pet. for review denied, 553 F.2d 93 (2d Cir. 1977) to which State Farm refers, were final orders of the Commission.* These matters will be more fully discussed on the merits should this Court grant the Petition for certiorari.

* The Commission declined to adopt the hearing officer's conclusions in MC-C-7287 cited by State Farm. The Commission's order following 124 MCC 514 (1976) requires compliance with its report, not that of the hearing officer. The Commission therein specifically declined to rule on the validity of arbitration at a given location 124 MCC 514. The Commission did state that its method of use by Aacon might give rise to discouragement of filing of claims -- an issue not here relevant since the claim of respondent was clearly filed and thoroughly prosecuted.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

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ADDENDA

[11] This quotation, of course, has a well established corollary—that procedural questions that do not affect the merits, or the substantive outcome, are governed solely by state law in state courts, even if federal substantive law is applicable. This principle is stated here to point out that there are other federal questions, besides the Constitutional one, that this Court might wish to comment on if it reviews this case.

First, the Appellate Division here, and perhaps the Court of Appeals, was obviously confused as to whether state or federal law was applicable on the question of *forum non conveniens*, citing only federal authorities for the proposition that *"forum non conveniens* does not apply where, as here, a 'special venue act' is invoked. *Baltimore & Ohio R. R. Co.* v. *Kepner*, 314 U.S. 44. . . ." (See *Aaacon* v. *Rosenbaum*, at 50 A.D.2d 182, appended to this petition, at 9a-10a.) This Court has already reversed one state court on the question of *forum non conveniens*. *Southern Ry. Co.* v. *Mayfield*, 340 U.S. 1, 3-5 (1950). Apparently, once is not enough. (The shipper relied extensively on *Mayfield*, in all three state courts, for the proposition that the shipper's motion to dismiss on grounds of *forum non conveniens* was governed solely by state law (CPLR 327), even though federal substantive law was applicable.)

Second, this Court might wish to take the opportunity to point out affirmatively that, in federal courts, the doctrine of *forum non conveniens* is as applicable to applications to enforce arbitration agreements, even those with limited venue provisions such as Aaacon's, as in any other action or proceeding. This point is a matter of some concern in light of *Aaacon Auto Transport, Inc.* v. *Ninfo*, 490 F.2d 83 (2d Cir. 1974). *Aaacon* v. *Ninfo* stated as a matter of law that 28 U.S.C. §1404(a), the federal *forum non conveniens* statute, could not be applied to Aaacon's petition under 9 U.S.C. §4 to enforce its arbitration clause, in view of the venue limitation in the clause. *Ninfo* was relied on by the Appellate Division below (see the appendix to this petition at 9a-10a).

Aaacon v. *Ninfo* is obviously bad law. It outrages common sense that a party could be able to impose inconvenient and inappropriate venue on an adversary, for testing the validity of an arbitration clause in an adhesion contract, by inserting a venue provision in the arbitration clause which, by virtue of the limited venue provision or for other reasons, might be determined on the merits, as in the case at bar, to be entirely null, void, and unenforceable *ab initio!* Moreover, 28 U.S.C. §1404(a) provides for transfer of *"any* civil action to any other district or division where it might have been brought." Emphasis added. This Court has already held that the word "any" in §1404(a) means just that. *Ex Parte Collett*, 337 U.S. 55 (1949), pointing out (at 57-8, 60-1) that 28 U.S.C. §1404(a) legislatively overruled *Baltimore & Ohio R.R. Co.* v. *Kepner*, *supra*, and related cases, relied on by the Appellate Di-

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vision at Aaacon's urging. A motion to enforce an arbitration agreement, even one with a limited venue provision, can, technically speaking, be brought in "*any* United States District Court which, *save for such agreement*, would have jurisdiction. . . ." 9 U.S.C. §4; emphasis added. The statutes thus make clear that any motion to enforce an arbitration agreement, even one with a limited venue provision, can be transferred, "for the convenience of parties and witnesses, in the interest of justice", 28 U.S.C. §1404(a), to any other "District Court which, save for such agreement, would have jurisdiction . . .", 9 U.S.C. §4. Any possible prejudice feared on account of a transfer, in relation to Aaacon's alleged right to arbitration in the venue provided in the agreement if the agreement and the venue limitation were found valid by the transferee court, could be avoided by conditioning transfer on an appropriate stipulation. (These points were all painstakingly explained, with appropriate citations, in the appellate courts below.)

SECOND CIRCUIT ERRATA SHEET

ERRATA ON OPINIONS 1975 TERM

Page 4088, line 20—delete "479" and insert "476" in place thereof.

Page 4088, footnote 11, 5 lines up from bottom of page—delete "as" and insert "a" in place thereof.

Page 4089, footnote 12, 3 lines up from bottom—delete "opinon" and insert "opinion" in place thereof.

Page 4095, footnote 16, 7 lines up from bottom of page—before "We" insert "quotation marks".

Page 4096, footnote 18, 6 lines up from bottom of page—delete *"Bankers Life & Co.,"* and insert *"Bankers Life & Cas. Co.,"* in place thereof.

Page 4097, line 25—change "§301(1)" (i.e., number one) to "§301(l)" (i.e., letter el).

Page 4098, line 20—delete "More" and insert "Most" in place thereof.

Page 4107, line 12—delete "defend" and insert "prosecute" in place thereof.

Page 4112, line 2—delete "a shipper" and insert "an employee" in place thereof.

Page 4118, lines 1 and 2—delete entirely and insert "Cir. 1973), this court affirmed from the bench and in reliance on that affirmance the Third Circuit affirmed by order two district court cases granting" in place thereof.

Page 4121, line 30—after "court cases, *e.g.*," insert *"Auacon Auto Transport, Inc.* v. *Echols*, No. 75 Civ. 1268,".

Page 4279, line 2—after "envelope of money." insert "In addition, Hall testified to one occasion on which she visited Monell in jail while Mrs. Grant and Doulin were meeting outside; on being introduced to Hall afterwards, Doulin remarked that she must be "the girlfriend of the bad boy." ".

Page 4279, line 7—after "bation." insert "Shapiro also recounted a statement by Doulin that he had "put in a good word, or done a favor . . . for a grandson of an old dear friend." ".

Page 4283, line 23—after *"Id."* insert "Such statements are admissible if the trial judge finds independent evidence that the defendant participated in a conspiracy with the declarant. *United States* v. *Geaney*, 417 F. 2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970). Doulin's admission to Shapiro that he had put in a good word for

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